Neutral Citation Number: [2009] EWHC 1949 (Admin)

Case No: CO/795/09

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2009

Before :

MR TIMOTHY CORNER QC
Sitting as a Deputy Judge of the High Court

- -

Between :

THE QUEEN ON THE APPLICATION OF THEIVENDIRAN MOHAN	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Justine Fisher (instructed by **Lawrence Lupin**) for the **Claimant**
Paul Tucker (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing date: 27th July 2009

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Judgment

Mr Timothy Corner QC :

INTRODUCTION

1. This is an application for judicial review of a decision of the Defendant relating to what the Claimant says was a fresh application for asylum or under Article 3 of the European Convention, within the meaning of paragraph 353 of the Immigration Rules HC 395.

2. The Claimant is a Sri Lankan Tamil who entered the United Kingdom on 16th October 2001 and has been here ever since.

3. On 17th October 2001 the Claimant claimed asylum. That claim was refused by the Defendant, by letter dated 16th November 2001. The Claimant appealed. His appeal was dismissed by the Adjudicator on 13th September 2002. The Adjudicator also held that the Claimant had not proved to the necessary standard that he would suffer treatment contrary to Article 3 of the European Convention. Permission to appeal from that decision to the Immigration Appeal Tribunal was refused on 7th November 2002.

4. By letter dated 3rd March 2003, the Claimant, by his solicitors, made further representations to the Defendant, seeking "Exceptional Leave to Remain." By letter dated 17th March 2006, the Claimant's solicitors wrote to the Defendant stating that the Claimant was still waiting to receive the Defendant's decision on its letter of 3rd March 2003. The Claimant's solicitors wrote again to the Defendant on 23rd October 2006.

5. The letters sent on behalf of the Claimant in 2003 and 2006 were brief. On 15th August 2008 the Claimant's solicitors sent a further letter to the Defendant, setting out in detail the Claimant's case that he was entitled to asylum, relying also on Articles 2 and 3 of the European Convention, and submitting that his application should be treated as a fresh claim. As well as referring to the Claimant's own background, the letter referred to and enclosed documents referring to the position in Sri Lanka generally, which the Claimant alleged to have changed substantially since the Adjudicator's decision in 2002. Among the documents relied on was a report of 2006 by the United Nations High Commissioner for Refugees ("UNHCR"), entitled "UNHCR Position on the International Protection Needs of Asylum Seekers from Sri Lanka."

6. By letter dated 28th October 2008, the Defendant dealt with the letters sent on behalf of the Claimant in 2003 and 2006, but not his letter of 15th August 2008. The Defendant considered the Claimant's position and decided that despite the decision of the European Court of Human Rights in NA v United Kingdom (2009) 48 EHRR 15 he would not be at "real risk" of persecution or serious harm, such as to ground a claim for asylum, and further that his removal would not breach the European Convention on Human Rights.

7. On 27th January 2009 the Claimant filed a claim for judicial review of the Defendant's "decision to refuse the Claimant's application for a fresh asylum claim, dated 28th October 2008, without a right of appeal." The Defendant filed its acknowledgement of service on 20th February 2009.

8. Permission to apply for judicial review was granted by Sales J on 27th March 2009 "in relation to the decision letter of 28 October 2008." Sales J stated

> "Both parties have treated the letter as one which refuses to accept that the Claimant has made a fresh claim….The Claimant was found to be a basically credible witness who had undergone episodes of detention and torture; he exhibits a number of the risk factors identified in *LP* and *NA v UK*, albeit in a somewhat qualified way; his claim for asylum was refused in 2002, but it appears that there has been a significant change in the security position in Sri Lanka in 2005/6 which has lowered the threshold at which a real risk of ill-treatment might be found to arise (see eg *LP* at [208]; *NA* at [54-55], [142])."

9. On 5th May 2009, the Claimant's new solicitors wrote to Treasury Solicitor "requesting your client reconsiders this matter, accepts this matter as a fresh asylum claim and affords the Claimant appropriate protection. Our request is founded on the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka dated April 2009. A copy is enclosed for your convenience."

10. On 7th July 2009 Treasury Solicitor responded to the Claimant's solicitors stating

> "I have now taken instructions from my client. He has considered your client's submissions of 15 August 2008 and 5 May 2009 and I have attached his decision letter in respect of those submissions. As you will see, his decision is that the submissions do not amount to a fresh claim."

11. The letter from the Defendant explicitly dealt with the claims made by the Claimant as a fresh claim. The letter also considered the Claimant's claim under Article 8 of the Convention and rejected it.

THE SUBJECT MATTER OF THIS CHALLENGE

12. As I have already stated, the claim as filed was in respect of the Claimant's decision of 28th October 2008. However, that decision did not deal with the Claimant's letter of 15th August 2008 and its substantial enclosures, and the Defendant's latest letter of 7th July 2009 deals with that letter and the Claimant's further letter of 5th May 2009.

13. At the hearing, the Claimant, represented by Ms Fisher, sought permission to amend his claim so as to incorporate a challenge to the Defendant's decision of 7th July 2009, and to amend his grounds in accordance with his skeleton argument.

14. The Defendant agreed to this course of action, and accordingly I allowed the application. It seems to me entirely in accordance with the decision in Turgut [2001] 1 All ER 719 (see Schiemann LJ at paragraph 26) for the amendment to take place.

15. Accordingly, by agreement between the parties I have considered this matter as a challenge to the decision of 7th July 2009, which incorporated the letter of 28th October 2008.

LEGAL BACKGROUND

16. An application of this nature made by a person within the jurisdiction is governed by paragraph 353 of the Immigration Rules which provides

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content
>
> (i) had not already been considered and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

17. In considering the second limb of paragraph 353 (ie whether or not the further submissions taken together with the original submissions provide a realistic prospect of success), the court has held that the test is "somewhat modest" (per Buxton LJ at paragraph 7 of WM (DRC) v Secretary of State for the Home Department and Secretary of State for the Home Department v AR (Afghanistan) [2006] EWCA Civ 1495.

18. Buxton LJ said at paragraph 7;

> "The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second….the adjudicator does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution….."

19. In ZT (Kosovo) v Secretary of State for the Home Department [2009] UKHL 6 Lord Phillips of Worth Matravers gave guidance at paragraph 23 about cases either under rule 353 or section 94 of the Nationality, Immigration and Asylum Act 2002 where the question is whether a claim is clearly unfounded,

> "Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt

> exists as to whether the claim may succeed then it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational."

20. Lord Brown of Eaton-Under-Heywood agreed with Lord Phillips (see paragraphs 75 and 76). Lord Neuberger said (at paragraph 83):

> "..for the reasons given by Lord Phillips, it seems to me that, where there are no issues of primary fact, application of this test will normally admit of only one answer, and a challenge to the Secretary of State's decision will normally stand or fall on establishing irrationality. Accordingly, I agree that if, in a case where the primary facts are not in dispute, the court concludes that….a claim has 'some reasonable prospect of success', it is hard to think of any circumstances where it would not quash the Secretary of State's decision to the contrary. However, I would again be reluctant to suggest that there is a hard and fast rule to that effect."

21. It was common ground at the hearing before me that the approach referred to above applied to this case. It was agreed that I have to decide, applying anxious scrutiny, whether the Claimant would have a reasonable prospect of success on appeal. It was further agreed that if I decide he would have such a prospect, the Secretary of State's decision must fall. Conversely, if I decide there is no such prospect, the Secretary of State's decision stands.

22. Important to the determination of a case involving Sri Lankan Tamils alleging a risk before AIT are the 12 risk factors arising from LP (LTTE area-Tamils-Colombo-risk?) Sri Lanka CG [2007] UKAIT 00076;

    i) Tamil ethnicity;

    ii) Previous record as a suspected or actual LTTE member or supporter;

    iii) Previous criminal record and/or outstanding arrest warrant;

    iv) Bail jumping and/or escaping from custody;

    v) Having signed a confession or similar document;

    vi) Having been asked by the security forces to become an informer;

    vii) The presence of scarring;

    viii) Returned from London or other centre of LTTE activity or fund raising;

ix) Illegal departure from Sri Lanka;

x) Lack of ID card or other documentation;

xi) Having made an asylum claim abroad;

xii) Having relatives in the LTTE.

23. In Nishantbar Thangeswarajah and Others [2007] EWHC 3288 (Admin) Collins J further considered the 12 risk factors. His observations were summarised by Sir George Newman in R (on the application of Sivarajah Sivanesan v Secretary of State [2008] EWHC 1146 (Admin) at paragraphs 22 and 23;

> "22.Collins J set out the 12 factors listed in LP….In paragraph 10 he observed
>
> '(1) …Tamil ethnicity by itself does not create a real risk of relevant ill treatment. Accordingly, some of these so-called risk factors are in reality, as it seems to me, background …factors.'
>
> (2) That '…if there is a factor which does give rise to a real risk that the individual will be suspected of involvement in the LTTE' background factors add to the significance of that risk.
>
> (3) He categorised (a) Tamil ethnicity; (b) illegal departure from Sri Lanka (c) lack of ID card or other documentation (d) an asylum claim made abroad as factors which 'neither in themselves, or even cumulatively, would create a real risk.'
>
> (4) He categorised (a) a previous record as a suspected member or actual member or supporter 'at a level which would mean the authorities retained an interest as 'likely to create a risk'; (b) a previous criminal record and an outstanding arrest warrant as 'highly material and clearly capable of ..producing a real risk.'
>
> (5) In paragraphs 11 and 12 he categorised (a) Bail jumping and/or escaping from custody as '..on the face of it highly material. (b) 'Release on payment of a bribe without more would not indicate that there was an on-going risk because it would likely to be recorded as a release..' and stated (c) '..whether the nature of the release was such as to lead to a risk would depend on the individual circumstances..'(d) 'A signed confession or similar document obviously would be an important consideration' (para 12).

(6) He observed that 'Having been asked by the security forces to become an informer can be of some importance.'(para 13)

(7) Scarring was generally speaking to be 'regarded as a confirmatory rather than as a free-standing risk element.'

(8) Having relatives in the LTTE is something 'that one can well understand might produce suspicions.'

23. Finally (para 16) Collins J observed that the test was

> '..whether there are factors in an individual case, or one or more, which might indicate that the authorities would regard the individual as someone who may well have been involved in the LTTE in a significant fashion to warrant his detention or interrogation'."

24. In NA v United Kingdom (cited above), the Court noted (paragraph 111) that the assessment of the existence of a real risk must be a rigorous one. It said (paragraph 124) that it was accepted by the parties that there had been deterioration in the security situation in Sri Lanka. It referred to the UNHCR paper of 2006, stating (paragraph 127) that "substantive weight" should be accorded to it, but that the paper "by its nature speaks in necessarily broad terms" and that (paragraph 128)

> "It follows that both the assessment of the risk to Tamils of 'certain profiles' and the assessment of whether individual acts of harassment cumulatively amount to a serious violation of human rights can only be done on an individual basis."

25. The Court accepted the identification of risk factors in LP while noting (paragraph 129) that these factors were not a "check list" or exhaustive, and stating (paragraph 130) that these factors must be examined cumulatively as well as separately.

26. The Court found (paragraph 133) that

> "…in the context of Tamils being returned to Sri Lanka, the protection of art. 3 of the Convention enters into play when an applicant can establish that there are serious reasons to believe that they would be of sufficient interest to the authorities in their efforts to combat the LTTE as to warrant his or her detention and interrogation."

THE SECRETARY OF STATE'S DECISION

Introduction

27. In considering whether to grant judicial review, it is agreed that regard should be had to both the Defendant's letters of 28th October 2008 and of 7th July 2009. That is because the later letter in effect incorporated the former.

28. As in some other recent Sri Lankan cases that have come before the courts, such as Veerasingham v Secretary of State [2008] EWHC 3044 (Admin) and R (Nirmalakumaran) v Secretary of State [2009] EWHC 1169 (Admin) the main issue for the Secretary of State on considering the fresh claim was the effect on the original conclusions of the Adjudicator of the different circumstances in Sri Lanka since the Adjudicator reached his decision-see Veerasingham (cited above) at paragraph 29.

Adjudicator's decision

29. In order to deal with the Secretary of State's decision it is necessary, to begin with, to go back to the Adjudicator's decision.

30. The Adjudicator accepted (see paragraph 13) that the Claimant had proved

> "(a) That he and his family did work for the LTTE at a low level between 1993 and 1995 when their area was controlled by the LTTE.
>
> (b) That the family did not relocate and stayed in the Jaffna area ceasing their connection with the LTTE after 1995 (save for two brothers who disappeared and may still be with the LTTE).
>
> (c) That the appellant was arrested in the circumstances he describes on 1 July 1997 and held for one and a half months. I also accept the appellant's evidence as to his ill-treatment during that detention, in particular the breaking of his arm requiring treatment thereafter.
>
> (d) I accept that the appellant was arrested on 24 July 2001 and I also specifically accept the appellant's evidence that he was targeted because he bore scars. I also accept that he was ill treated on that occasion.
>
> (e) I accept the appellant's evidence of the method of his release on both occasions."

31. The Adjudicator went on to find (see paragraph 16) that the evidence on Sri Lanka for the situation relating to asylum seekers prior to the ceasefire in February 2002 indicated that an "appellant with the sort of profile that this appellant has could be at risk."

32. However, the Adjudicator continued at paragraph 17 that

> "Even using the analysis above, there are reasons to believe that this appellant would not have been at risk. Firstly I consider the history of his detentions. The appellant was detained in the north for relatively short periods. The objective material shows that a great many of those detentions were never recorded and no record would be had of them. However even if there were a record the appellant's description of his

> release show that on each occasion the fact that he was of no interest to the authorities and properly vouched for was recorded. The appellant specifically says that his release was effected on the second occasion because the documents from his first detention were produced and it was shown that he was not of interest to the authorities. If that had been the case in the past there is no reason to believe that that would not occur in the future. Furthermore the appellant's own admission about how he travelled from the north to Colombo clearly shows that at the time he was travelling he was not wanted in his own name and he was not of interest to the authorities."

33. Therefore the Adjudicator said at paragraph 18

> "All of this would have made the claim a somewhat marginal one in the past. This makes it even less likely that in the present circumstances the appellant would be of interest [sic] the authorities. All parties agree and the objective material shows that there has been an appreciable improvement in the situation in Sri Lanka since the ceasefire was signed in February 2002. The emergency regulations have lapsed. The Prevention of Terrorism Act, whilst still on the books, is not actually being used. The terms of the ceasefire itself prohibits the use of this. The objective material shows that the checks on returning Tamils are much lessened. Even the UNHCR admit that it is only in occasional cases that people are now stopped and questioned."

34. At paragraph 20 the Adjudicator stated

> "In those circumstances and given the changed situation there seems little or no likelihood that the appellant would be stopped on entering the country or be of interest to the authorities on a round up. The appellant is not wanted. He has been properly released in the past. He was not of interest to the authorities when he left the country. His history of arrest even if ascertainable would clearly show that he was not of continuing interest. I accept that he does bear scars. The scars are noticeable particularly those on his face. However they are not obvious battle scars or scars of torture. A person can get facial scars through any accidental cause and indeed can break an arm through accidental cause. The broken arm and scars on his legs would not be particularly noticeable unless people were specifically looking for scars. In the light of the objective material it seems that although in the past this was the case (particularly in the very specific circumstances of the aftermath of the terrorist attack on Colombo airport) the present situation shows that it is not likely that this would be the case in the future. For these reasons I find that the appellant has not proved that there is a real risk that if he returned to Sri Lanka he would be detained or ill-treated in the manner in which he suffered in

> the past. I therefore find that the appellant has not proved to the necessary standard that he has a well-founded fear of persecution because of his perceived political opinion or his Tamil ethnicity if he returned to Sri Lanka. I dismiss the asylum appeal."

35. At paragraph 21 the Adjudicator held that though the Claimant had relied on Article 3 of the European Convention, both his counsel and counsel for the Defendant admitted that the issues related to Article 3 were identical to the asylum appeal. The Adjudicator held that the Claimant had not proved to the necessary standard that there was a real risk of treatment contrary to Article 3.

Claimant's further submissions

36. The further material submitted by the Claimant almost exclusively concerned the deterioration in the situation in Sri Lanka after the Adjudicator's decision. The one exception to that was the report of Dr Steadman, a consultant psychiatrist, dated 12th August 2002. That report was submitted by the Claimant with his letter of 15th August 2008.

37. Of the documents submitted by the Claimant in 2008 which related to the deterioration of the situation in Sri Lanka, all dated from 2008 save the 2006 UNHCR report. The other documents included material from Human Rights Watch, Reuters, ABC Radio Australia, and Amnesty International. All showed that the "appreciable improvement in the situation in Sri Lanka since the ceasefire was signed in February 2002" had worsened. In the 2006 UNHCR report it was recommended inter alia that

> "All asylum claims of Tamils from the North or East should be favourably considered……." (paragraph 34, page 12).

38. The 2009 UNHCR report, submitted by the Claimant with his letter of 5th May 2009, reaches similar conclusions. It is stated (page 29) that

> "On the basis of the objective evidence of frequent and persistent human rights violations against Tamils from the North, UNHCR considers that there is a reasonable possibility that a Tamil asylum seeker from the North will experience serious harm if returned to Sri Lanka."

Defendant's letter of 28th October 2008

39. In his letter of 28th October, after preliminary remarks the Defendant referred to the cases of NA and LP cited above. The Defendant then considered the Claimant's case against the risk factors in LP.

40. So far as Tamil ethnicity was concerned, the Defendant cited information from the Home Office Country of Information dated 11th June 2008 ("HOCI") on the Tamil population and stated

> "In light of the above we are of the opinion that the issue of your client's ethnicity in itself is not a sufficient risk factor. It must be considered in conjunction with other risk factors."

41. The Defendant then referred to the second factor in LP, previous record as a suspected or actual LTTE member or supporter. The Defendant stated that the involvement of the Claimant and his family with the LTTE was of low level, between 1993 and 1995, and referred to an extract from the Sri Lankan Operational Guidance Note of August 2008 suggesting that such persons were not at risk from the LTTE.

42. In relation to the third factor in LP, namely criminal record, the Defendant stated there was no evidence that the Claimant had a criminal record, and therefore "It is concluded that it is highly unlikely that your client would be at risk if returned to Sri Lanka." The Defendant went on to quote from paragraph 12 of the Adjudicator's decision.

43. The Defendant then considered LP factor (iv), namely bail jumping and/or escaping from custody. The Defendant noted that the Claimant was placed on bail (surety) in Sri Lanka but never attempted to escape from custody, and quoted from paragraphs 6 and 17 of the Adjudicator's decision, and also information from the HOCI.

44. The Defendant noted in relation to the fifth factor in LP that there was no evidence that the Claimant had signed a confession or other similar document, or, in relation to the sixth factor, that the Claimant had ever been asked to act as an informer.

45. In relation to the presence of scarring, the Defendant cited paragraph 20 of the Adjudicator's report, and referred to the Tribunal in LP at paragraph 271 as stating that scarring should only be of significance where there were other factors that would bring the Claimant to the attention of the authorities.

46. The Defendant further referred to information from HOCI suggesting examinations of persons with scarring took place only where there was another reason to suspect the individual concerned.

47. As to the eighth factor in LP, the Defendant noted that "no evidence has been submitted, which suggests that your client has been involved in any kind of activities in support of the LTTE whilst in London or the United Kingdom."

48. In relation to LP factor (ix), the Defendant acknowledged that the Claimant left Sri Lanka illegally, but stated that

> "Despite the above, it is considered that your client would have no difficulties returning to Sri Lanka as he would be provided with a valid Emergency Travel Document by the United Kingdom prior to removal. It is therefore not accepted that he would be at risk."

49. In relation to factor (x) in LP, namely lack of ID card or other documentation, the Defendant referred to the Adjudicator's decision at paragraph 6 and concluded that

> "..your client is in possession of valid identity documentation, however although this may now be obsolete, your client will be provided with a valid Travel Document."

50. The Defendant went on to refer to information from HOCI relating to the obtaining of identity documents.

51. The Defendant then considered the eleventh factor in LP, having made an asylum claim abroad, and referred to the Tribunal in LP having found that this factor alone would not place asylum seekers at risk, backed up by information from HOCI.

52. Finally, the Defendant referred to LP factor (xii), having relatives in the LTTE. The Defendant referred to the Claimant's evidence about his brother's involvement, and noted that it was accepted that the Claimant and his family had low level involvement with LTTE in the 1990s, and said

> "Therefore it is concluded that no evidence has been presented by your client, to suggest that members of his family or his friends in Sri Lanka, have been subject to any difficulties from the Sri Lankan authorities as a result of there [sic] former links with the LTTE."

53. At page 8 of his letter the Defendant referred to the evidence submitted by the Claimant of the worsened situation in Sri Lanka but stated that

> "…no information has been provided to show how the current political situation in Sri Lanka relates to your client's particular circumstances or his claim for asylum in the United Kingdom. The references made in support of your client's claim do not establish that Tamils in general have a well founded fear of persecution and it has not been demonstrated why your client would face a real risk of persecution due to any change in the political situation in Sri Lanka.
>
> Your client was considered to have a previous record as a [sic] actual LTTE member but was not of any interest to the authorities. Your client did not escape from custody and was not placed on a wanted list. Your client has no criminal record or outstanding arrest warrant or has made a signed confession, nor has he been asked by the security forces to become an informer and therefore we consider that there are no substantial grounds for believing he has a well founded fear or persecution or will be at real risk, upon his return to Sri Lanka."

54. In the remainder of the letter, the Defendant dealt with the Claimant's comments in relation to the availability of medical assistance and the Claimant's position in relation to Article 8 of the Convention.

Defendant's letter of 7th July 2009

55. The Defendant's letter of 7th July referred to the cases of LP, NA, Thangeswarajah and Sivanesan cited above, as well as the recent country guidance case of AN [2008] UKIAT 00063, to which I refer below.

56. Having referred to the material submitted with the Claimant's letter of 15th August 2008, the Defendant referred to R v Secretary of State ex p Boybeyi [1997] INLR 132, and Tanveer Ahmed v Secretary of State [2002] UKIAT 00439 for the principles to be observed in examining documents. The Defendant acknowledged that in accordance with WM (DRC) v Secretary of State (cited above) he should give anxious scrutiny to the question whether further submissions gave a realistic prospect of success, and stated that in his opinion there was no such prospect.

57. The Defendant referred to the Claimant's statement, the Adjudicator's decision at paragraphs 6 and 17, and Dr Steadman's report, stating (paragraph 20 of the letter) that "Doctor Steadman's opinion is not considered to be objective or to be conclusive evidence that corroborates your client's claims", and then referring to the Adjudicator's decision at paragraph 7.

58. At paragraph 25 of the letter dated 7th July 2009, the Defendant referred to a Country of Origin Information Service report dated 19th February 2009, which itself referred to a letter dated 1st October 2008 from the British High Commission. In summary, the letter from the High Commission was similar in its effect to the letter about scarring referred to in the Defendant's letter of 28th October 2008.

59. At paragraph 26 of the letter of 7th July, the Defendant stated

> "In your further submission of 5 May 2009 you reply [sic] on the UNHCR report on Sri Lanka dated April 2009. It is the position of the SSHD that the contents of the 2009 UNHCR report do not give rise to a fresh claim, for the following four reasons: (i) the 2009 UNHCR report is objective, and you have failed to set out in any proper detail on what basis this gives rise to a real risk in your client's case; (ii) in any event the position set out in the 2009 UNHCR report is essentially the same as that set out in the 2006 UNHCR report; and there has been no significant change in the evidential position; (iii) the SSHD is monitoring the situation in Sri Lanka, and is satisfied that it is not such as to justify a blanket grant of leave to remain; and (iv) your client has a weak case given the findings of the Adjudicator in her determination dated 13 September 2002. These findings are dealt with above."

60. The Defendant then went on to deal with the Claimant's Article 8 claim, and dismissed it, having regard to Huang and Kashmiri v Secretary of State [2007] UKHL 11.

ANALYSIS

Claimant's case

61. I should say at the outset that the Claimant's case before me was based entirely on the question whether he would have a realistic prospect of success on appeal against the refusal of asylum. Miss Fisher for the Claimant made clear in answer to a question from me that although the Defendant's decision dealt separately with the Claimant's human rights claim under Article 8, there was no challenge in relation to that aspect of the decision. She further maintained the position adopted by the Claimant before the Adjudicator, that issues under Article 3 were identical to those in relation to the asylum claim.

62. The Claimant said that it was impossible to say that there was no realistic prospect of success on an appeal relating to asylum in this case. The Claimant said he had eight of the risk factors identified in LP, namely (i), (ii), and (vii) to (xii).

63. Taking the Defendant's letters of 28th October 2008 and 7th July 2009 together, the Claimant said that on the face of it there was a lengthy and reasoned decision, but that the decision could not stand, because it contained a number of errors.

64. To begin with, and most importantly, the Defendant had failed to take account of the serious deterioration in the political situation in Sri Lanka since the Adjudicator's decision of 2002.

65. The Claimant stated that the Defendant did not consider the Claimant's detention on 1st May 1997 by the Sri Lankan army on suspicion of activities with the LTTE. He was detained for one and a half months, where he suffered ill treatment leading to a broken arm and scars on his face. There was also no mention, said the Claimant, of his second arrest in 2001 on suspicion of involvement with the LTTE when he was detained and released following a bribe.

66. These omissions, said the Claimant, showed a lack of anxious scrutiny.

67. The Claimant went on to say that the Defendant stated that there was no evidence to suggest the Claimant has a criminal record. While it was accepted that the Claimant was released as he was not at that time considered a terrorist, it could not be said that there would be no record of his detention of one a half months, as he clearly had documents that were produced in the second detention and he was asked to sign with the authorities for a period of eight months.

68. The Claimant argued that in stating that scarring is of significance only if there are other factors that would bring him to the attention of the authorities, the Defendant was disregarding the other factors, and in particular his previous detentions as a result of suspicion of activity with the LTTE.

69. As to factor (viii), the Claimant said that the point made by the Defendant that the Claimant had given no evidence that he had been involved in any activity or support of the LTTE was a misunderstanding of the factor. What matters, the Claimant said, is the perception of the Sri Lankan authorities that the Claimant will be returned from London, a known destination of LTTE support and fundraising.

70. As to the Defendant's suggestion that the fact that the Claimant left illegally can be rectified by an emergency travel document, the Claimant said an emergency travel document will not remedy the illegal exit from Sri Lanka. He would need a national identity document. The Claimant drew attention in this regard to R(Sivapalan) v Secretary of State [2008] EWHC 2955 (Admin).

71. In submissions before me, the Claimant concentrated on the issue whether the Defendant could reasonably reach the view that there he had no realistic prospect of success, rather than on a textual analysis of errors in the Defendant's decision.

Conclusion

72. In reaching a decision on this case, I have to decide whether I am satisfied that in reaching his conclusion there was no realistic prospect of success, the Secretary of State reached a rational decision. Having regard to ZT (Kosovo) it was common ground that if I decide there is, in fact, a realistic prospect of success, that must mean that the Secretary of State could not rationally have reached the opposite conclusion in this case.

73. I have come to the conclusion that it cannot be said that there is no realistic prospect of the Claimant succeeding before the AIT. In my judgement, applying anxious scrutiny, the Claimant would have a realistic prospect of success.

74. I accept the submission for the Secretary of State that the starting point should be the Adjudicator's decision. Mr Tucker for the Defendant rightly drew my attention to the Adjudicator's conclusions, extracts from which I have set out in preceding paragraphs of this judgement.

75. Mr Tucker laid particular emphasis on paragraph 17 of the Adjudicator's decision. At the start of that paragraph, having referred in paragraph 16 to the reasons why prior to the ceasefire of 2002 the Claimant might have been thought to be at risk, the Adjudicator said; "Even using the analysis above, there are reasons to believe that this appellant would not have been at risk", and then set out her reasons for that statement.

76. The Adjudicator then continued, at paragraph 18, "All of this would have made the claim a somewhat marginal one in the past. This makes it even less likely that in the present circumstances the appellant would be of interest the authorities [sic]." In the remainder of that paragraph the Adjudicator referred to the "appreciable improvement" in the situation since 2002.

77. At paragraph 20, Mr Tucker reminded me, the Adjudicator began her conclusions by saying "In those circumstances and given the changed situation there seems little or no likelihood that this appellant would be stopped from entering the country or be of interest to the authorities on a round-up."

78. Mr Tucker's case was that these extracts showed that the Adjudicator's view was that the Claimant's case must fail, quite apart from the fact that the situation had recently improved, culminating in the ceasefire signed in February 2002. Mr Tucker's contention was then that the Defendant's decision in this case must stand, given that the only new factor on which the Claimant relied was the deterioration in the general situation since 2002.

79. I do not think the Adjudicator's reasoning was as clear cut as Mr Tucker suggested. At paragraph 16 the Adjudicator identified reasons why prior to the ceasefire an appellant with the Claimant's profile could be at risk. At paragraph 17 she turned to consider countervailing factors, leading her to the overall view, stated at the start of paragraph 18, that this claim would have been "somewhat marginal" in the past-ie before the ceasefire.

80. I accept Mr Tucker's warning that one must not read decisions such as this with the precision used when construing a statute. However, taking a broad, common sense view, it seems to me that the Adjudicator's view was that, in the absence of the 2002 ceasefire, this was a claim that was marginal-meaning that there were factors pointing both ways. If anything, therefore, I think consideration of the Adjudicator's decision would suggest that an appeal now, with the situation having once again deteriorated, would have a realistic prospect of success.

81. However, my assessment cannot end there. I must take account of the Claimant's position against the background of the case law since the Adjudicator's decision, as well as the deterioration of the general situation. I accept, of course, that the UNHCR speaks in necessarily broad terms, and that an assessment of the risk to Tamils of certain profiles can be done only on an individual basis. However, account has to be taken of the general situation in Sri Lanka at the present time. I note here that Mr Tucker did not contend that the situation at the date of the hearing before me had changed from that obtaining at the time of the 2009 UNHCR report.

82. There was no real dispute about the risk factors that apply to the Claimant. He has Tamil ethnicity (factor (i)). He made an illegal departure from Sri Lanka (factor (ix)), and he made an asylum claim from abroad (factor (xi)). All of those are matters which Collins J said in Thangeswarajah would be factors which neither in themselves, or even cumulatively, would create a real risk.

83. Risk factor (vii) applies to the Claimant, because he has scarring, although his counsel accepted the point made by Collins J in Thangeswarajah that this feature would generally be regarded as confirmatory rather than a free-standing risk element.

84. Risk factor (viii) also applies to the Claimant, because he would be returning from London. The Defendant accepted that this must be taken into account, but rightly pointed out that as his letter of 28th October 2008 states, there was no evidence that the Claimant had been involved in activities in support of the LTTE whilst in London or the United Kingdom. I note that in LP it was stated that this factor must be "highly case specific" (see paragraph 218), and that a Claimant would need to show

> "the extent to which the Sri Lankan Embassy in London was aware of his activities and was thus likely to have passed the information on to Colombo when the applicant was being deported or removed."

85. The Claimant placed most reliance on factor (ii), previous record as a suspected or actual LTTE member or supporter. It was common ground that the Claimant had had involvement with the LTTE, and that he had been detained twice, in 1997 and in 2001. Further, and importantly, Mr Tucker accepted on behalf of the Defendant that there has been a record of at least the earlier detention.

86. At paragraph 6 of the Adjudicator's decision, it is stated that when the Claimant was arrested in 2001;

> "He was released on that occasion when the village headman took papers to the authorities to show that he had been arrested before and released."

87. At paragraph 17, it is stated that

> "The appellant specifically says that his release was effected on the second occasion because the documents from his first detention were produced and it was shown that he was not of interest to the authorities."

88. Mr Tucker accepted that a record of the detention had been created, but said that did not necessarily mean that such records would be available to the authorities at Colombo airport, where the Claimant would arrive if removed from the United Kingdom. He relied for that on paragraphs 12.16 and 32.09 of the HOCI set out at page 4 of the Defendant's letter of 28th October 2008.

89. However, Mr Tucker fairly pointed out that the Court in NA had accepted (see paragraphs 135 and 145) that such records may be readily accessible to the airport authorities.

90. I was provided with a copy of the recent country guidance case of AN &SS (Tamils-Colombo-risk?) Sri Lanka CG [2008] UKAIT 00063. That case deals with the issue of computer records.

91. In AN the AIT said (see paragraph 122(f)) that

> "the National Intelligence Bureau in Sri Lanka maintains a computerized database of persons who are thought to pose a threat, while immigration officers at Bandaranaike International Airport use a computer system which can flag up whether a newly arrived passenger is on the 'Wanted List' or 'Stop List.' The CID at the airport will be alerted when this happens. But there is no firm evidence to support the contention that everyone who has ever been detained by the police or army is likely to be on the database."

92. That paragraph is based on paragraph 107 of the determination.

93. In R (Lenin) v Secretary of State [2008] EWHC 2968 (Admin) Wyn Williams J, following AN, stated that on the facts of that case, there was no proper basis on which it would be proper to infer that details relating to the Claimant before him would be available to the authorities at the airport. Wyn Williams J distinguished NA. on the basis that it was not clear whether a record had been made of the arrest in the case before him(see paragraph 39).

94. In Veerasingham v Secretary of State [2008] EWHC 3044 (Admin) Blake J pointed out (paragraph 28) that the AIT in AN did not have the benefit of the decision in NA,

and, granting judicial review, distinguished the findings in AN about computer records, stating at paragraph 26 that

> "…in this case the claimant is not merely relying on the random detentions on three occasions to which he has been subject but the prolonged detention to which reference has been made. In the absence of any positive evidence that records have been destroyed in anticipation of the peace process, it is not possible to characterise as fanciful or without substance the claimant's case as to his fears."

95. Blake J referred to Lenin at paragraph 29 and said

> "I have made plain in this judgement the importance to be attached to the implications of the prolonged detention from April-July 1998 that was occasioned by a report from an informer and that is a distinction from the apparent scenario identified by the adjudicator in the case of Lenin and the issue before this court whether the Secretary of State's decision fell to be quashed."

96. Finally in this context, I refer to the decision of Stephen Morris QC in R (Aruliraivan) v Secretary of State [2009] EWHC 30 (Admin). In that judgement Mr Morris considered AN, NA, Lenin and Veerasingham on the matter of computer records. He noted (paragraph 54) that the AIT in AN did not have the benefit of the assessment of the European Court in NA, which he rightly described as a substantial and important judgement. He drew attention (paragraph 56) to paragraph 145 of the judgement in NA, and the fact that the Court stated there that "the greatest possible caution" should be taken where there had been a previous and recorded detention. He also rightly stated (paragraph 58) that AN does not exclude the possibility that the Claimant's record will be available at Colombo airport, but makes clear that it is unlikely that everyone who has ever been detained or who has been questioned about possible knowledge in or involvement with LTTE is now on a computer database checked at the airport.

97. In the present case I think it right to adopt the same approach as Blake J in Veerasingham. The longest period of detention of the Claimant was for a shorter period than in Veerasingham, However, this case is one where the Claimant and his family did have involvement with LTTE as opposed to mere alleged involvement, where the Claimant was detained twice, on one occasion for one a half months, and where the Defendant concedes a record was made of the detention. In those circumstances, and having regard to NA, I conclude that, in the words of Blake J, "it is not possible to characterise as fanciful or without substance the Claimant's case as to his fears."

98. I am fortified in that conclusion by the fact that Mr Tucker for the Defendant did not seek to rely on the approach in AN in his submissions before me, although the case was referred to in the Defendant's letter of 7th July (paragraph 1) as one of the cases which had been taken into account.

99. Finally in relation to the risk factors, factor (xii), having relatives in the LTTE, was agreed to be met by the Claimant. It appears that not only were the Claimant and his family involved at a low level between 1993 and 1995, but in addition two brothers were, and might still be, with the LTTE. This is a factor which Collins J said in Thangeswarajah could "produce suspicions."

100. I have to reach a conclusion about whether, taking all these matters together, the Claimant would have a realistic prospect of success on appeal, against the background of the deterioration in Sri Lanka since 2002. As I have already said at the start of this assessment, I think he would indeed have a realistic prospect of success.

101. It is of some assistance to note that the facts in this case bear a similarity to those in NA. That case involved a Sri Lankan of Tamil ethnicity, who entered the United Kingdom secretly and claimed asylum. His fear of the Sri Lankan authorities arose from the fact that he was a young Tamil male who had been previously detained by the authorities six times. The authorities had photographed him and taken fingerprints. Furthermore a record of his most recent period of detention had been created as a result of documentation signed by his father to secure his release. The Adjudicator found (see the Court's judgement at paragraph 139) that following the ceasefire agreement, he would be of no interest to the authorities. Upon his return from the United Kingdom, the applicant believed that the authorities would take an interest in him as a failed asylum seeker and on discovering his scarring would suspect him of involvement with the LTTE.

102. An important difference between the present case and NA was that in NA, the applicant claimed not only that he was at risk from the authorities, but also from the LTTE. However, that part of his claim was rejected by the Court. In relation to his claim about risk from the authorities, Mr Tucker accepted that the differences between this case and NA were "qualitative" only.

103. Of course, each case must be considered on its own facts, and I bear in mind the warning of Sir George Newman in Sivanesan (cited above) at paragraph 43 that the detailed facts of another case can be an unreliable barometer of risk. Further, the facts in NA might be considered in some respects stronger from the point of view of the applicant than in the present case. However, I do think that the fact that the Court in NA decided that the applicant in that case did face a real risk is some indication of the Claimant's realistic prospect of success on appeal in the present case.

104. There is one further matter in the present case, which does not appear to have been discussed in detail in NA. One of the risk factors which the Claimant meets in this case is lack of identification documents (factor (x)). The Defendant's letter of 28th October 2008 says that the Claimant would be provided with emergency documents by the United Kingdom.

105. Miss Fisher for the Claimant drew my attention to the decision of Mr Anthony Edwards-Stuart QC in R (Sivapalan) v Secretary of State [2008] EWHC 2955 (Admin), in which the judge said at paragraph 49 on the question of identity documents

> "As to the question of lack of identification documents, I readily accept that they would be provided with suitable travel

> documents to ease their path through immigration when they arrive in Sri Lanka. However, I have seen nothing in the material before the court that explains how they might go about obtaining proper papers thereafter. This seems to me to present a real problem, and for so long as they lack proper identification, it seems all too obvious that they would be exposed to random arrest and harassment from the authorities…"

106. In response, Mr Tucker further relied on the HOCI information set out at page 6 of the letter of 28th October 2008 as establishing that emergency papers "are acceptable as means of identification for presentation to police officers, whether at checkpoints or at police stations….."

107. The picture in this regard is not clear to me. In particular, it is not clear whether the above HOCI information was before Mr Edwards-Stuart.

108. Further, in AN the AIT concluded at paragraph 122 (g) that

> "Failed asylum seekers who arrive in Colombo without a National Identity Card should be able to get a new one on production of a birth certificate, which is usually easy to obtain. If an NIC cannot be issued, the UNHCR will issue a substitute which is generally acceptable. Those newly arrived in Colombo who do not yet have an ID card should, if questioned about their ID, be able to establish that they have recently come from abroad."

109. This appears to suggest that persons without ID cards would not encounter the difficulties referred to in Sivapalan, and it is not apparent that AN was referred to the court in Sivapalan.

110. Finally in relation to factor (x), I note that lack of identity documents was characterised by Collins J in Thangeswarajah as one of a number of matters which would not even cumulatively create a real risk.

111. In the circumstances, on the evidence before me, and given my limited ability to test it, I do not consider that the fact that the Claimant lacked an ID card materially adds to the case before me that he has a realistic prospect of success on appeal. It might be different before an Immigration Judge, where the matter could be investigated more fully. However, even in the absence of this factor, I am of the view that the Claimant has a realistic prospect of success on appeal.

112. Overall, I find that in the circumstances now obtaining, an appeal by the Claimant would have a realistic prospect of success. Otherwise put, the Defendant's decision that he did not was irrational. Accordingly, the Defendant's decision must be quashed.